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No. 98-1438

In the Supreme Court of the United States

OCTOBER TERM 1999

THE CITY OF CONCORD,
Petitioner,

v.

NEIL S. HARDIN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In attempting to reduce the questions presented to this Court to whether the Ninth Circuit "abuse[d] its discretion in declining to consider two of Petitioner's arguments," Respondent Hardin pointedly demonstrates the need for this Court's intervention: Whatever the Ninth Circuit may have thought, surely *this* Court would be surprised to learn that the lower federal courts have "discretion" to overlook their own lack of subject matter jurisdiction, or to disregard this Court's repeated holdings that the lack of jurisdiction *cannot* be waived. It is Respondent's success in persuading the Ninth Circuit and the District Court to disregard the limits on their jurisdiction, and on their powers to assess liability for speech and conduct squarely protected by the First Amendment, for which Petitioner seeks remedies here.

Compounding the error, Respondent begins his opposition with the inexplicable misstatement that Petitioner "does not and cannot claim" that the Ninth Circuit's decision "conflicts with the decision of any other court of appeals," or that the issues presented are "important enough to merit the Court's attention." Opp. at 1. Even the most casual reader of the Petition could not mistake that Petitioner *does* so contend; for the reasons set out in the Petition and below, any fair-minded reader of the law and the record must conclude that it *can*.

Specifically, the City's Petition demonstrates a clear circuit split on two distinct questions: (1) Whether Title VII claims brought by individuals who fall within the Policymaker Exclusion (42 U.S.C. §2000e(f)) are outside the subject matter jurisdiction of the federal District Courts; and (2) Whether a Title VII claimant's status as an excluded "Policymaker" (which controls the claimant's right to jury trial) is to be decided as a question of law by the court, or as a question of fact by a jury.

As for the importance of these issues, the Court need not rely on Petitioner's word alone. Thirty-seven California

cities, large and small, have joined in a Brief of Amicus Curiae ("BAC") to emphasize the vital importance of these questions to the conduct of local government throughout the country: These issues affect the balance of power between federal and state government to determine issues of critical importance to the conduct and tenure of state and local policymakers. *See* Petition 20-22; BAC 5-8. They also affect the delicate balance between local officials' First Amendment rights (and duties) to criticize appointed policymakers, and policymakers' rights to be free of discrimination. Petition 28-30; BAC 9-14.

Petitioner will not reiterate here each of the many reasons justifying a grant of certiorari, nor respond to each of Respondent's many factual and legal misstatements.[1] This Reply briefly corrects only the most blatant errors Respondent's opposition fosters.

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[1]For example, Respondent devotes close to half of his brief to the prurient details of the harassment allegedly engaged in by Mayor Byron Campbell, who is not a party to this Petition (and whom the first jury to hear this case found not to have violated the Plaintiff's rights in any respect). However diverting Respondent may wish this recitation to be, it has no relevance to whether Plaintiff's status as an excluded Policymaker deprived the District Court of jurisdiction to present her claims to a federal jury. Nor do the details of the alleged harassment have any bearing on the City's First Amendment defense: Whether Plaintiff was harassed or not, the verdict *must* be reversed if the jury *could have* based the City's liability on protected speech or conduct. *See* Part II, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPLITS IN THE CIRCUITS CONCERNING THE APPLICATION OF TITLE VII'S POLICYMAKER EXCLUSION.

A. There Is A Conflict Among The Circuits Over Whether The Policymaker Exclusion Is Jurisdictional Or Can Be Waived.

Respondent's contention (at 11) that "[n]o intercircuit conflict exists" is simply untrue: The circuits are in fact divided on whether or not the Policymaker Exclusion affects the federal District Courts' subject matter jurisdiction. In *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988)—a case that Respondent inexplicably asserts (at 11 n.5), does not "address[] subject matter jurisdiction"—the Eighth Circuit squarely held that it had "no subject matter jurisdiction to hear [plaintiff's] claim" (843 F.2d at 278), because her position "was on a policymaking level and was exempt from Iowa civil service laws." *Id.* at 279.[2] In contrast, Respondent himself contends that *Clark v. Tarrant County*, 798 F.2d 736, 742, 748 (5th Cir. 1986) holds that the plaintiff's status as an excluded policymaker "does not affect jurisdiction." Opp. 11. In addition, both the Ninth Circuit here, and the Seventh Circuit in *Roche v. City of Chicago*, 24 F.3d 882, 886-87 (7th Cir. 1994), held that the Policymaker

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[2]Respondent is equally wrong in asserting (at 11 n.5), that the decisions of the other Courts of Appeals cited in the Petition do not "address subject matter jurisdiction." Each of the following decisions expressly acknowledged that it was reviewing, and affirming, a District Court's dismissal of a Title VII or ADEA case *for lack of subject matter jurisdiction* on the ground that the plaintiff fell within the Policymaker or "personal staff" exclusions: *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990); *EEOC v. Reno*, 758 F.2d 581, 583 & n.6, 585 (11th Cir. 1985); *EEOC v. Board of Trustees*, 723 F.2d 509, 510, 512 (6th Cir. 1983).

Exclusion can be *waived*—thus implicitly determining that the Policymaker Exclusion does *not* affect the District Courts' subject matter jurisdiction, which can never be waived.

Respondent also completely misses the point on the merits when he argues (at 11), that this is just another situation like the one presented in *Bell v. Hood*, 327 U.S. 678 (1946), in which the issue presented is integral to the existence of a valid claim under federal law. Unlike the claim in *Bell*, a plaintiff's status as an excluded Policymaker *does not determine whether or not she states a valid federal claim*: As the Petition explains, under the carefully considered remedial scheme Congress adopted in 1991, the Policymaker Exclusion determines *only whether the claimant's allegations of discrimination will be presented to a federal District Court jury or to the EEOC*. *See* Petition at 5; *compare* 42 U.S.C. §§2000e(f), 2000e-5(f)(3) *with* 2 U.S.C. §§1202, 1220.

Finally, Respondent's unsupported pronouncement that "the verdict would survive even if the Title VII claim had failed" (Opp. 12-13), is incorrect for the simple reason that federal District Courts have no subject matter jurisdiction over the claims of excluded Policymakers. If the District Court never had subject matter jurisdiction over Plaintiff's federal claims, then it had no original jurisdiction at all, and could not exercise supplemental jurisdiction over Plaintiff's state-law claims. 28 U.S.C. §1367; *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 329 (9th Cir. 1996).

B. The Circuits Are Split On Whether The Applicability Of The Policymaker Exclusion Is A Question Of Fact For The Jury Or Of Law For The Court.

Respondent is no more faithful to the record or the holdings of the lower federal courts in contending that there is no split among the Courts of Appeals concerning the role

of the court vis-à-vis the jury in determining whether to apply the Policymaker Exclusion.

With respect to the record, Respondent is flatly wrong in asserting (at 7) that the District Court "made no . . . findings" relevant to Plaintiff's Policymaker status in ruling on the City's summary judgment motion. The record could hardly be more explicit: After a detailed discussion of the responsibilities of Plaintiff's office, the District Court concluded:

> "Because Hardin exercises significant policymaking functions as City Manager, *the Court finds that she was 'an appointee on the policymaking level' under Title VII.*" App. A36 (emphasis added)

The District Court also held that that the Concord Municipal Code was "carefully crafted to include Hardin in portions of the civil service system. . . . Because Hardin is not exempt from the civil service system, she may bring a Title VII claim against the City." App. A38.

Because the District Court made a binding determination that Hardin *was* a policymaker (*see* FED. R. CIV. P. 56(d); Petition 18-19), but found as a legal matter that she was "subject to . . . civil service laws," there was nothing remaining for the City to present to the jury. The City thus cannot have waived this issue by failing to do so. Particularly in the context this record provides, the Ninth Circuit's decision that the City waived the Policymaker Exclusion by not presenting it to the jury must mean that it is *always* a jury question. The Tenth Circuit agrees that this is a factual matter (*Anderson v. City of Albuquerque*, 690 F.2d 796, 800-01 (10th Cir. 1982)), whereas the Sixth, Seventh, and Eighth Circuits make the determination by reference to applicable state or local law. *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th Cir. 1983); *Americanos v. Carter*, 74 F.3d 138, 141, 144 (7th Cir. 1996); *Stillians*, 843 F.2d at 278-79.

The question presented is an important one: The Ninth Circuit's decision effectively stands Congress' carefully crafted remedial scheme on its head by holding that a jury trial is required to determine whether a claimant has a right to a jury trial.

II.

IMPOSITION OF TITLE VII LIABILITY FOR EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Once again, Respondent misstates both the record and the law in arguing that the Court should not review the important question Petitioner raises concerning the collision of Title VII with the First Amendment.

First, although Respondent spends close to half of his brief describing the prurient details of Mayor Campbell's alleged improprieties, he also concedes that liability was premised to a great degree on activities protected by the First Amendment, including the alleged "negative letter campaign," and the City Council's (constitutionally protected) refusal to respond to it. Opp. 5. Indeed, Respondent's own recitation of the facts makes it clear that the City's purported "retaliation" liability was premised entirely on protected First Amendment activity.

Second, Respondent's contention that "Campbell's motions did not mention the First Amendment" is, once again, simply untrue. *See* App. A92 (Defendants' motion in limine: "Use of the word 'campaign' here improperly presumes or implies a concerted effort either to write letters for others to sign or, alternatively to personally solicit people to write letters that they would not have written of their own volition, or in the normal exercise of their *First Amendment*

rights" (emphasis added)); App. A75 (argument on Defendants' objection: "to let the letters come in under the guise of circumstantial evidence is really, in my judgment, starting to get very close to infringement upon *First Amendment* rights" (emphasis added)).

Finally, it is Respondent who does not and cannot argue that the First Amendment questions raised in this Petition are unimportant. Indeed, thirty-seven California cities have described the dramatic impact of this issue on their responsibilities to their constituents:

> "The rulings force elected officials to think long and hard about publicly criticizing an appointee's performance, effectively cloaking appointee-claimants with a shield from public scrutiny and criticism. Who dares to publicly criticize an appointee who has filed a discrimination claim? Or one who merely threatens to file a claim? Once again, Amici are placed in a dilemma: shirk their responsibilities of overseeing appointees, or risk exposure by speaking out on public issues." (BAC 10)

As this Court has repeatedly emphasized, if there is any likelihood that liability was premised on the exercise of First Amendment rights (either to speak or not to speak), then reversal is required. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924-25 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in the City's Petition and in the Brief of Amicus Curiae, the Court should grant the Petition, and either entertain the important issues raised therein or, alternatively, summarily vacate the Ninth Circuit's decision, and remand with instructions to decide the jurisdictional and First

Amendment issues the Ninth Circuit previously declined to consider.

DATED: April 27, 1999.

Respectfully,

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